

In the United States Court of Federal Claims
OFFICE OF SPECIAL MASTERS

TIMOTHY BASS,	*	
	*	No. 12-135V
Petitioner,	*	Special Master Christian J. Moran
	*	
v.	*	Filed: August 3, 2012
	*	
SECRETARY OF HEALTH	*	Motion for Leave to File Amended
AND HUMAN SERVICES,	*	Petition, Motion to Dismiss for
	*	Failure to State a Claim
Respondent.	*	

Anne Toale, Maglio, Christopher, and Toale, P.C., Sarasota, FL, for petitioner;
Jennifer Reynaud, United States Dep't of Justice, Washington, DC, for respondent.

**RULING GRANTING MOTION FOR
LEAVE TO FILE AN AMENDED PETITION AND DENYING
MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM¹**

A June 22, 2012 ruling permitted Mr. Bass to file a motion for leave to file an amended petition pleading allegations that, if true, would establish that Mr. Bass has suffered from an injury (Guillain-Barré syndrome) for more than six months. Mr. Bass filed such a motion on the same day. The Secretary opposes Mr. Bass's motion. Because Mr. Bass satisfies the liberal standards for allowing amended pleadings, his motion is GRANTED. Conversely, the Secretary's motion to dismiss for failure to state a claim that was directed against the original petition is DENIED.

¹ The E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002), requires that the Court post this ruling on its website. Pursuant to Vaccine Rule 18(b), the parties have 14 days to file a motion proposing redaction of medical information or other information described in 42 U.S.C. § 300aa-12(d)(4). Any redactions ordered by the special master will appear in the document posted on the website.

Discussion

The initial question is whether to allow Mr. Bass to amend his petition. In cases based upon the Court of Federal Claims's general (that is, non-vaccine) jurisdiction, under the circumstances present here, "a party may amend the party's pleading only by leave of court . . . and leave shall be freely given when justice so requires." Rule 15(a) of the Rules of the Court of Federal Claims ("RCFC").² Numerous cases have examined the "when justice so requires" standard in terms of whether the opposing party would be substantially prejudiced, the amendment has been unreasonably delayed, or the amendment would be futile. E.g., Normandy Apartments, Ltd. v. United States, 100 Fed. Cl. 247, 258 (2011) (citing, among other cases, Foman v. Davis, 371 U.S. 178, 182 (1962)).

Of the three criteria, the Secretary's opposition to the amended petition most closely resembles an argument that she would be "substantially prejudiced."³ The Secretary contends Mr. Bass "has identified no legitimate basis for filing his petition before he could attest to the six-month petition content requirement of § 11(c)." Resp't Resp., filed July 12, 2012, at 1. Similarly, the Secretary maintains that "allowing petitions that cannot meet the petition content requirements to be cured by supplemental pleadings in the event that the requirements are ultimately met creates an unnecessary burden and wastes the resource of the Vaccine Injury Compensation Program." Id. at 2.

A problem with the Secretary's arguments is that they are not so much directed to the amended petition as they are against the original petition. In the Secretary's view, because Mr. Bass filed his original petition prematurely, he

² Strictly speaking, the Court of Federal Claims has not incorporated Rule 15(a) into the Vaccine Rules. However, RCFC Rule 15(a) is "consistent with the Vaccine Rules," Vaccine Rule 1(c), and special masters have indicated that they will generally accept amendments to pleadings. Office of Special Masters, Guidelines for Practice under the National Vaccine Injury Compensation Program (Rev. Ed. 2004) § II.A (stating "If the evidence unexpectedly turns out to support an alternative theory of proof, leave to amend the petition will be liberally granted."). Thus, the standard in RCFC Rule 15(a) will be used here. See Koston v. Sec'y of Health & Human Servs., 23 Ct. Cl. 597, 601 (1991) (reviewing special master's decision not to allow respondent to amend its report pursuant to Rule 15(a)).

³ The other two criteria, delay and futility, are not involved.

should suffer the consequence of not being allowed to amend his petition. This perspective is not in accord with the Federal Circuit's statement that "there is no indication that Congress intended that compensation would be barred simply because the petition was filed too early in the limitations period." Black v. Sec'y of Health & Human Servs., 93 F.3d 781, 791 (Fed. Cir. 1996). Consequently, because allowing an amended petition would be in the interest of justice, Mr. Bass's June 22, 2012 motion for leave to file an amended petition is GRANTED.

This amended petition will be the point of comparison for the Secretary's pending motion to dismiss for failure to state a claim upon which relief may be granted. (The June 22, 2012 order deferred ruling on that motion until Mr. Bass had an opportunity to file a motion seeking leave to file an amended petition.) The Secretary's argument was that Mr. Bass's petition did not allege that he suffered an illness for more than six months, and, therefore, Mr. Bass could not satisfy the provisions of 42 U.S.C. § 300aa—11(c)(1)(D). See Resp't Reply, filed April 19, 2012, at 7-8.

The amended petition contains allegations that on approximately November 20, 2011, Mr. Bass started developing weakness and numbness in his lower extremities. Mr. Bass's amended petition also alleges that as of June 18, 2012, he still had numbness and tingling in his extremities.

In light of the well-established principle that when considering a motion to dismiss for failure to state a claim, allegations are construed in favor of the petitioner, the amended petition contains allegations, which, if true, show that Mr. Bass suffered from Guillain-Barré syndrome from November 20, 2011 through June 18, 2012 at least. Because these allegations support the finding that Mr. Bass suffered Guillain-Barré syndrome for more than six months, his amended petition adequately pleads facts required by section 11(c)(1)(D). Consequently, the Secretary's motion to dismiss for failure to state a claim is DENIED.

Conclusion

Mr. Bass's June 22, 2012 motion for leave to file an amended petition is GRANTED. The Secretary's motion to dismiss for failure to state a claim is DENIED.

In addition, within 30 days, the Secretary shall file a status report regarding the completeness of the medical records. If the Secretary believes that the medical

records are sufficient for preparing a report pursuant to Vaccine Rule 4, the Secretary shall propose a date for filing this report.

IT IS SO ORDERED.

s/Christian J. Moran
Christian J. Moran
Special Master